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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1143

STATE OF MISSOURI, *Respondent,* vs. BRADFORD R. JONES, *Petitioner.*	)	Kansas City District No. 28583 Supreme Court No. 60425
STATE OF MISSOURI, *Respondent,* vs. BRADFORD R. JONES, *Petitioner.*	)	Kansas City District No. 28667 Supreme Court No. 60426
STATE OF MISSOURI, *Respondent,* vs. BRADFORD R. JONES, *Petitioner.*	)	Kansas City District No. 28868 Supreme Court No. 60427

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BROWN & BROWN
ROY W. BROWN
JAMES R. BROWN
Lawyers' Building
1024 Locust Street
Kansas City, Missouri 64106
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

The petitioner, Bradford R. Jones, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Missouri Court of Appeals, Kansas City District, entered in these proceedings on August 29, 1977 and the denial of the Application to Transfer to the Supreme Court of the State of Missouri dated November 14, 1977.

OPINIONS BELOW

The Opinion of the Missouri Court of Appeals, Kansas City District, Cause No. 28583, is attached hereto as Appendix "A" and the denial of the Supreme Court for Transfer, Cause No. 60425, is attached hereto as Appendix "B".

The Opinion of the Missouri Court of Appeals, Kansas City District, Cause No. 28667, is attached hereto as Appendix "C" and the denial of the Supreme Court for Transfer, Cause No. 60426, is attached hereto as Appendix "D".

The Opinion of the Missouri Court of Appeals, Kansas City District, Cause No. 28868, is attached hereto as Appendix "E" and the denial of the Supreme Court for Transfer, Cause No. 60427, is attached hereto as Appendix "F".

The Opinions of the Missouri Court of Appeals in these causes were entered on August 29, 1977. Motion for Rehearing and/or Transfer denied on October 12, 1977 by the Missouri Court of Appeals, Kansas City District, Application to Transfer denied in all causes by the Supreme Court of the State of Missouri on November 14, 1977.

JURISDICTION

The judgment of the Missouri Court of Appeals, entered on August 29, 1977 affirmed the conviction of the trial Court. Application to Transfer denied by the Supreme Court of the State of Missouri on November 14, 1977. This petition is filed within the applicable time thereafter and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether the trial Court erred as a matter of law and to the prejudice of Bradford R. Jones in failing to grant his Motion to Suppress Evidence, presented in writing prior to trial and renewed during the course of the trial, with reference to certain statements made by Bradford R. Jones to Witness, Officer VanBuskirk, said statement being: "What Jerry says is true"; said statement not only being untrue and prejudicial to the said Bradford R. Jones, but also being the fruit of an illegal and warrantless arrest and illegal interrogation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendments IV, V, and XIV

Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Bradford R. Jones, was charged in Cause No. KCD 28583 (Supreme Court No. 60425) by indictment with the crime of robbery contrary to Missouri Revised Statutes, Section 560.135. Said petitioner was convicted on December 2, 1976 by a jury and his penalty assessed at seven years in the Department of Corrections.

Petitioner, Bradford R. Jones, in Cause No. KCD 28667 (Supreme Court No. 60426) was charged by indictment with the crime of robbery contrary to Missouri Revised Statutes, Section 560.135. Said petitioner was convicted by a jury on February 10, 1976 and his penalty assessed by the Court at twenty years in the Department of Corrections.

Petitioner, Bradford R. Jones, in Cause No. KCD 28868 (Supreme Court No. 60427) was charged by indictment with the crime of assault with intent to kill with malice contrary to Missouri Revised Statutes, Section 559.180. Said petitioner was convicted by a jury on April 21, 1976 and his penalty assessed by the Court at twenty years in the Department of Corrections.

Petitioner filed an identical Motion to Suppress Evidence and to Dismiss in all cases on May 9, 1975 in the following form, the only difference being that in Cause No. 28868, the crime of assault with intent to kill with malice aforethought was set out in the opening paragraph as opposed to the other two cases which were cases of robbery first degree.

"Motion to Suppress Evidence and Motion to Dismiss

COMES NOW Bradford R. Jones, defendant herein, in person and by and through his attorney, Roy W. Brown, states to the Court that he is charged with violation of Missouri Revised Statutes, 1959, as amended Robbery First Degree; that any seizure of evidence in this case was made in violation of and contrary to law in that:

1. Said seizure was made without a search warrant having been issued in the manner prescribed by Article I, Section 15, of the Constitution of the State of Missouri, 1945, and without other lawful authority.

2. That at the time of said seizure, no misdemeanor or overt act was being committed in the presence of the arresting officer nor was the defendant reasonably suspected of having committed any felony.

3. All in violation of Amendments 4 and 14 of the Constitution of the United States.

4. The arrest was not a real technical arrest; the arrest did not precede the search; the arrest was not made in good faith but for the sole purpose of creating an excuse to search; the search was not bona fide for articles connected with the arrest.

5. That any statements, oral or written, alleged to have been made by defendant were made without defendant being properly advised of his rights and the presence of his attorney.

WHEREFORE, defendant moves the Court to suppress the use in evidence of any article, statement or other evidence taken from defendant and to dismiss the charges filed against him.

FILED: May 9, 1975."

On October 31, 1975, prior to adducing evidence in support of the Motion to Suppress and Motion to Dismiss, Appellant sought leave of Court to amend and insert a portion of an Exhibit, namely, Exhibit No. 4 setting out the entire Paragraph 2 as follows:

> "The suspect was informed that the other suspect, Jerry Miller, had given a statement implicating him, Jones, in several robberies and two shootings. Jones asked to read the statement which he was allowed to do. Reporting officer discussed these cases with Jones for approx. one hour and forty five minutes after which Jones stated that he would like to give a statement but that he had better ask his attorney first. Jones also stated however, he knew what his lawyer would say and that was keep his mouth shut. The suspect called his mother and asked her to have his attorney, Mr. Roy Brown, contact him by phone. At 0905 hours, Mr. Brown called and conversed with the suspect after which Mr. Brown asked to speak

> to reporting officer. Mr. Brown informed reporting officer that he did not want his client to make any type of statement. After reporting officer and Mr. Brown's conversation was ended, Jones stated that he would still like to give a statement but that his lawyer wouldn't let him. Jones then looked at the statement of Jerry Miller's which was laying on the desk and stated, 'What Jerry told you is true'. Jones was returned to Detention Unit at 0915 hours."

Leave was granted to attach said paragraph as part of the pleading and later was accepted into evidence. (Tr. 14—Vol. 2).

The evidence produced on the Motion to Suppress Evidence is as follows: that the Appellant, Bradford R. Jones, the co-defendant Gerald Miller and Margie Miller, co-defendant's wife, were arrested at approximately 6 P.M. on March 28, 1975. Officer VanBuskirk, the interrogating officer, stated under questioning by counsel for the Appellant that he had no knowledge of the existence of either a search warrant of the premises involved or for an arrest warrant for any of the three individuals involved and especially Bradford R. Jones. Assistant prosecuting attorney, George Ely, was sworn to testify and after reviewing his file thoroughly, stated that he could find no application for a search warrant or any type of a warrant for the arrest of any of the three parties involved.

There is no doubt that the Petitioner, Bradford R. Jones, was in a bad physical state and under conditions of withdrawal according to the testimony given by Officer VanBuskirk at Tr. 19—Vol. 2 as follows:

"Q. Tell the Court about Mr. Jones' physical condition at the time that you began your interview with him; and I will clarify further, with reference to whether or

not in your opinion he was in a position of withdrawal from drugs?

A. My opinion he was in a withdrawal from drugs. Shortly after we got down to the room he started having, I guess you would describe them as body jerks, where his whole body would just jerk. And I asked Mr. Jones if, you know, about his condition, if he was on drugs or whatever, and when he had his last injection, fix, or shot, or whatever you want to call it. I don't remember what his reply was. I think it was sometime either earlier that day, or the day before. And he kept playing it down that he was all right, you know, that everything was okay. He was in good shape. And on one, possibly two occasions, he asked to go to the bathroom, that he was sick at his stomach. He had nausea and stomach cramps, which I did take him to the bathroom. Then he was thirsty for water. I think he got two, maybe three drinks. I don't recall.

Q. Are these symptoms consistent in your opinion with drug withdrawal?

A. Yes, sir."

No warrants for arrest or to search existed. In the course of the briefings and arguments of the points suggested on this Motion to Suppress it is admitted by the State that said arrest was illegal and that probable cause did not exist at the time that the police officers from Kansas City, Missouri burst into the home of Gerald Miller and placed the three parties in custody. The State produced evidence of three exhibits, namely, Exhibit 1, allegedly a written statement signed by Gerald Miller in front of Officer VanBuskirk implicating the Petitioner in some robberies that occurred in the State of Kansas and Exhibit 2, the statement signed by Gerald Miller in

the presence of Officer VanBuskirk allegedly implicating the Appellant in some robberies and crimes occurring in the State of Missouri and also Exhibit 3 which was a copy of a statement or alleged interrogation information statement, allegedly signed by Jones, in front of Officer VanBuskirk. The three exhibits were entered without objection. Exhibit 3 on the Motion to Suppress Evidence later became Exhibit 9 in the trial of the case on February 9, 1976. Exhibit 3 clearly shows as follows:

5.	Date and time statement signed	BLANK
11.	Statement made	BLANK
12.	Refused to make statement	YES
13.	Requested attorney	YES

The Petitioner, Bradford R. Jones, took the stand and under oath testified that he was in fact in a state of dire withdrawal from the use of drugs. He did not clearly remember everything that took place stating on numerous occasions: "I think so". When questioned by his attorney, with reference to whether or not he made the statement "What Jerry says is true", he emphatically denied making said statement and testified as follows (Vol. 2—Tr. 33):

"Q. Well, specifically, you heard Officer VanBuskirk testify, and it is also in this summary, that you stated, 'What Jerry told you is true;' did you make any such statement?

A. No, sir; I didn't. The man is lying about that.

Q. You deny that emphatically?

A. I sure do. That would become a stupid thing for me to do after you told me."

Immediately after the testimony was completed the Court overruled Petitioner's Motion to Dismiss but made the following statement:

> "The arrest in the case was made without a warrant. The State has failed to demonstrate that there was probable cause or any other basis for a warrantless arrest. We must take it as we find it; and that is exactly the way we find it, a warrantless arrest which which must be justified by the State in some manner."

The Court then took Petitioner's motion to suppress statement under advisement and requested Briefs. The Petitioner furnished his brief in due time and same was answered by the State. On November 26, 1975 after considering the Brief and the Motions and the evidence, the Court overruled Petitioner's Motion to Suppress the Evidence. Said Motions were renewed at trial and again overruled.

REASONS FOR GRANTING WRIT

Petitioner respectfully submits that the action of the trial Court in denying Petitioner's motion to suppress the statement "What Jerry says is true" and the actions of the Appeals Court in affirming said conviction resulting from said trials violate Petitioner's rights under the IV, V and XIV Amendments of the United States Constitution and violate the rulings of this Court in *Wong Sun* v. *U. S.*, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 which held that the admissions of a defendant, made after an illegal arrest, must be excluded unless they are so attenuated and remote from the arrest as to totally dissipate the taint of the illegal police action. Petitioner further respectfully submits that the State of Missouri presented no evidence which would dissipate the taint of the illegal arrest involved.

Petitioner further respectfully submits that the rulings of the trial Court and the Appeals Court, Kansas City District, State of Missouri, as aforesaid, are a direct violation to the ruling in the case of *Richard V. Brown* v. *State of Illinois*, 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254, argued March 18, 1975, decided June 26, 1975, which clearly indicated that any statement procured from a defendant while unlawfully arrested and detained has the same status as physical evidence obtained under an illegal arrest.

Judge Blackmun, in the Opinion for the Court, stated:

> "This case lies at the crossroads of the Fourth and Fifth Amendments. Petitioner was arrested without probable cause and without warning. He was given, in full, the warnings prescribed by Miranda v. Arizona. Thereafter while in custody, he made two inculpatory statements. The issue is whether evidence

of those statements was properly admitted, or should have been excluded, in the petitioner's subsequent trial for murder in the state court. Expressed another way, the issue is whether the statements were to be excluded as the fruit of an illegal arrest, or were admissible because the giving of the Miranda warnings sufficiently attenuated the taint of the arrest."

The Court further said:

"While we therefore reject the per se rule which the Illinois courts appear to have accepted we also decline to adopt the alternative per se or 'but for' rule. The petitioner himself professes not to demand so much. . . . *The question of whether a confession is the product of free will under Wong Sun must be answered on the facts of each case.* No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploration of an illegal arrest. But they are not the only factor to be considered (Emphasis ours).

And the burden of showing admissibility rests, of course, on the prosecution. . . We conclude that the state failed to sustain the burden of showing that the evidence in question was admissible under Wong Sun . . . The judgment of the Supreme Court of Illinois is reversed."

Petitioner respectfully submits that the facts in the case of Bradford R. Jones are very similar to the facts in the case of *U. S.* v. *Bernard L. Monroe, et al.*, 397 F. Supp. 726 (1975). The Court held in *Monroe*, supra, page 731:

"Based on all the offered testimony the Court finds that the government has failed to show by a preponderance of the evidence that the statements of these defendants were made voluntarily or that there were knowing and intelligent waivers of their constitutional rights. To the contrary, the evidence clearly indicates that they were undergoing withdrawal at the time of their interrogation and that their waivers and statements were not the product of a rational intellect and free will . . . Their statements will therefore be suppressed."

Petitioner further respectfully submits that the actions of the police officer, VanBuskirk, and the subsequent refusal of the trial judge to suppress the evidence and subsequent action of the Appeals Court affirming the conviction of Jones are contrary to *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602. The *Miranda* decision states:

"Once warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting out of in custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the indi-

vidual must have the opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to the police, they must respect his decision to remain silent."

CONCLUSION

Wherefore, Petitioner, for reasons set out heretofore, respectfully prays this Court to issue its Writ of Certiorari for the purpose of reviewing the judgments of the Supreme Court of the State of Missouri.

ROY W. BROWN
Lawyers' Building
1024 Locust Street
Kansas City, Missouri 64106
Attorney for Petitioner, Bradford R. Jones

APPENDIX

APPENDIX "A"

STATE of Missouri, Respondent,

v.

Bradford R. JONES, Appellant.

No. KCD 28583.

Missouri Court of Appeals,
Kansas City District.
Aug. 29, 1977.

As Modified On Courts' Own Motion
Oct. 11, 1977.

Motion for Rehearing and/or Transfer
Denied Oct. 12, 1977.

Application to Transfer Denied
Nov. 14, 1977.

Defendant was convicted before the Circuit Court, Jackson County, James A. Moore, J., of robbery in the first degree with a deadly weapon, and he appealed. The Court of Appeals, Robert R. Welborn, Special Judge, held that: (1) statement made by defendant was not involuntary due to defendant's withdrawal symptoms, nor invalid because it was given after defendant had exercised his right to remain silent, nor inadmissible as fruit of illegal arrest; (2) trial court did not err in admitting into evidence testimony concerning theft of narcotics during robbery of drug store; (3) trial court did not err in permitting testimony of alleged accomplice that he and defendant were users of heroin, nor that they had stolen car

en route to drug store, nor that accomplice was charged with other offenses; (4) trial court did not err in permitting police officer to testify concerning statement taken from alleged accomplice, nor in failing to grant mistrial due to statement in prosecutor's closing argument that no evidence had been presented to refute State's case; (5) trial court did not err during voir dire examination of jury panel in failing to strike for cause panel members who stated that they had been victims of criminal acts, and (6) trial court did not err in denying mistrial and giving "hammer" instruction when jury advised court that they stood eight to four.

Affirmed.

See also Mo.App., 558 S.W.2d 242; 558 S.W.2d 246.

1. Criminal Law (Key) 414

There was no error in finding that statement made by defendant, although given at time when defendant was suffering drug withdrawal symptoms, was knowingly and voluntarily made.

2. Criminal Law (Key) 412.1(4)

Statement made by defendant arrested for robbery of drug store which was volunteered by defendant after defendant's attorney told officer by telephone that he did not want defendant to make a statement and after officer informed defendant that his right to remain silent would be respected and that interrogation was at an end, was not product of illegal interrogation.

3. Criminal Law (Key) 412.1(3)

Statement made by defendant was act of free will admissible in evidence in prosecution for robbery in the first degree with a deadly weapon despite fact that defendant's

arrest was found to have been illegal, in light of absence of outrageous police conduct, time elapsed from arrest to making of statement, and presence of intervening circumstances including giving of *Miranda* warning, opportunity to eat, relatively relaxed discussion, defendant's personal willingness to make statement, defendant's call to his mother, attorney's call to both defendant and detective, termination of interview, and making of statement without having been asked question requiring response.

4. Criminal Law (Key) 369.2(7)

Where defendant was tried on charge of taking by force and violence of $400 resulting from robbery of drug store in which narcotics, insulin, syringes and money were taken, testimony concerning taking of narcotics from drug store, in addition to money, was admissible in that it related to continuous transaction which was part of offense charged.

5. Criminal Law (Key) 1044.1(5)

Questions directed to witness, alleged accomplice of defendant charged with robbery of drug store, whether defendant used heroin and whether witness himself used heroin, made apparent nature of evidence sought, and thus motion to strike answers, which was not preceded by objection to questions, came too late to provide basis for error.

6. Criminal Law (Key) 372(14)

Conclusion of trial court that evidence sought by questions directed to alleged accomplice of defendant charged with robbery of drug store, whether defendant used heroin and whether witness himself used heroin, was admissible as part of common scheme or plan for robbery, was not shown to have been erroneous.

7. Criminal Law (Key) 372(14)

In prosecution for robbery of drug store, testimony as to theft by defendant and his alleged accomplice of automobile which was driven to drug store and used in departure from store was admissible as part of common scheme or plan for robbery.

8. Criminal Law (Key) 369.2(6)

Where motion to strike testimony of alleged accomplice of defendant charged with robbery of drug store was based upon assumption that testimony as to other offenses of accomplice would cause jury to assume that defendant was also involved in those offenses, in that alleged accomplice had testified that he had seen defendant daily for two months before drug store robbery, but there was no testimony linking defendant with those other offenses or showing when they occurred, trial court did not err in overruling motion to strike.

9. Criminal Law (Key) 410

Statement made by defendant after statement of alleged accomplice had been read to him, that what accomplice had told police was true, was "adoptive admission" which permitted State to introduce at trial of defendant for robbery of drug store relevant portion of statement made by alleged accomplice.

10. Criminal Law (Key) 721(5)

Statement by prosecutor in closing argument that "No witness or evidence was presented to refute the state's case" was not comment on defendant's failure to testify. Section 546.270 RSMo 1969, V.A.M.S.

11. Criminal Law (Key) 719(1)

Where defense counsel in his argument stated to jury that he could suggest that arrest of defendant and accomplices was illegal arrest, trial court committed no error in ruling upon objection that defense counsel could not argue further than that arrest was illegal, in that there was no evidence before jury as to basis for defendant's arrest, and defendant had made no effort to point out any evidence which would have supported argument that illegality of arrest was matter for consideration of jury as reflecting upon voluntariness of defendant's incriminating statements to police.

12. Jury (Key) 131(10)

Comments of trial judge during voir dire examination of jury panel that "there is a good deal of difference between being against crime, and being able to give a fair and impartial trial to someone who is charged with a crime. * * * But a general feeling of being opposed to crime is not inconsistent with being able to give someone who is charged with a crime a fair and impartial trial" did not constitute abuse of discretionary authority of trial judge in guiding voir dire examination. MAI Criminal No. 1.02.

13. Jury (Key) 105(2)

In prosecution for first-degree robbery with a deadly weapon, trial court did not err during voir dire examination of jury panel in failing to strike for cause panel members who stated that they had been victims of criminal acts.

14. Robbery (Key) 26

Evidence in prosecution for first-degree robbery of drug store with a deadly weapon, brought against defendant who had made statement that what his alleged ac-

complice had said in statement incriminating defendant was correct, was sufficient to carry case to jury.

15. Criminal Law (Key) 742(2)

Credibility of defendant's alleged accomplice whose statement to police and testimony incriminated defendant was for jury and was not determinable as question of law.

16. Criminal Law (Key) 863

In prosecution for first-degree armed robbery with a deadly weapon, trial court did not err, when jury returned to courtroom after three hours of deliberation and advised court that they stood eight to four, in denying request for mistrial and giving "hammer" instruction. MAI Criminal No. 1.10.

17. Criminal Law (Key) 884

Verdict returned by jury in prosecution for first-degree armed robbery with a deadly weapon was not invalid because it failed to designate place of imprisonment. MAI Criminal No. 2.86(a).

Roy W. Brown, John A. Wilson, Kansas City, for appellant.

John C. Danforth, Atty. Gen., J. Michael Davis, Asst. Atty. Gen., Jefferson City, for respondent.

Before SHANGLER, P. J., and WELBORN and HIGGINS, Special Judges.

ROBERT R. WELBORN, Special Judge.

A jury in the Jackson County Circuit Court found Bradford R. Jones guilty of robbery in the first degree with a deadly weapon and assessed his punishment at

seven years' imprisonment. After his motion for new trial was overruled, Jones appealed.

On February 23, 1975, at around 10:30 A.M., two men wearing caps pulled well down on their heads and bandanas covering the lower part of their faces, entered the Revco Drug Store at 103rd and State Line in Kansas City, Missouri. One of the men stuck a gun in the face of James T. White, a Revco employee standing near the store checkout counter, and told White: "This is a robbery, get down on the floor." White complied and the robber emptied the cash register drawers. White and the robber went to the rear of the store where the second robber had gone after entering the store. There the second robber had encountered Joseph G. Trabon, the pharmacist at the store, put a gun in his face and demanded to know where the narcotics were. Trabon opened the case containing narcotics and threw the key on the floor as directed by the robber. White and the first robber reached the rear of the store about that time. White was ordered to lay on the floor and did so. The robbers took "some stuff out of the narcotics cabinets," a box of insulin and syringes and also money in a cash register and the charge drawer. The robbers then left and police were called to the scene. Some $400 to $600 was missing from the store.

White described the first robber as 5'7" or 5'8" tall and weighing around 150 pounds. He said the second robber who went to the rear of the store was somewhat larger than the first. Trabon described the man who accosted him as 5'8" or 5'9" tall, weighing 160 to 170 pounds. Neither could describe facial characteristics of the robbers except that both were white males.

At around 5:00 P.M., March 28, 1975, Gerald Wayne Miller, his wife, Margie, and appellant Bradford R. Jones

were arrested by Kansas City police at Miller's residence. They were taken to police headquarters. Under police questioning, Miller admitted numerous robberies in Missouri and Kansas, including the Revco robbery, in which he implicated Jones. Typewritten copies, one relating to Missouri offenses and one to the Kansas crimes, of Miller's statement were prepared around 4:00 A.M., March 29.

Detective VanBuskirk of the Kansas City Police Department, who had participated in the interrogation of Miller, took Jones to an interrogation room at police headquarters at 7:10 A.M., March 29. Jones was given a written Miranda warning form which he read and signed. VanBuskirk began an interrogation in the course of which he mentioned that Miller had made a statement. Jones asked to read Miller's statement and Van Buskirk permitted him to do so. The statement included information about the Revco robbery. After he read the statement, Jones asked to see Miller, but the request was denied. Jones told VanBuskirk that he wanted to make a statement, but that he wanted to call his lawyer first. Jones was permitted to call his mother and he asked her to have his attorney, Roy Brown, call him. A short time later, at 9:05 A.M., Brown called and was permitted to talk to Jones. After Brown and Jones had talked, Jones handed the telephone to VanBuskirk and told him that Brown wanted to speak to him. Brown told VanBuskirk that he did not want his client to make any kind of a statement.

After the conversation with Brown ended, VanBuskirk told Jones: "Your attorney don't want you to say anything. * * * I will take you back upstairs." At that time and without further interrogation by VanBuskirk, Jones looked at the Miller statements lying on the desk and said: "What Jerry told you is true."

Jones was indicted for the Revco robbery. Prior to trial he filed a motion to suppress the use in evidence of any oral statement allegedly made by the defendant because they "were made without defendant being properly advised of his rights and the presence of his attorney." The motion also sought suppression of evidence seized at the time of defendant's arrest on the grounds that his arrest was without authority.

A hearing was held on the motion. All of the evidence was directed toward the suppression of the oral statement to VanBuskirk. Appellant denied that he made the statement. VanBuskirk testified that he did. The trial court found that defendant "knowingly, understandingly, and voluntarily, made the statement to the effect, 'What Jerry told you is true.'" The court further found that, although defendant was suffering from withdrawal symptoms at the time of the police interrogation, the evidence showed that he was not confused and that he had no "observable mental instability," and that he was "physically and mentally competent" at the time of the statement.

The court further found that, although defendant's arrest was illegal, "the statement was not the fruit of an illegal arrest." The court stated that it "does note and give weight to the absence of outrageous police conduct, the time elapsed from arrest to the making of the statement, and the presence of intervening circumstances.

"The intervening circumstances include the non-talismanic Miranda warning, opportunity to eat, relatively relaxed discussion, defendant's personal willingness to make a statement, defendant's call to his mother, the attorney's call to both defendant and the detective, the termination of the interview, and the making of the statement without

a question requiring response. All these intervening circumstances attenuated the taint of the arrest."

At Jones' trial, the Revco employees, White and Trabon, testified concerning the robbery, but neither could identify Jones. Miller testified in detail to the planning and execution of the robbery. He said that he was the man who stopped at the front of the store and Jones the man who first went to the rear. VanBuskirk testified over renewed objection to the remark of Jones and portions of Miller's statement, dealing with the Revco offense, were placed in evidence. No evidence was offered by the defendant.

The jury returned a verdict of guilty. After defendant's motion for new trial was overruled, the court entered judgment and sentence to seven years' imprisonment in accordance with the jury verdict.

On this appeal, the first point of appellant is that the trial court erred in failing to suppress the use in evidence of his alleged statement to VanBuskirk—"What Jerry told you is true." Appellant's attack on the trial court's ruling is on three grounds:

1. That the court erroneously found that the statement was not the fruit of an illegal arrest.

2. That the statement was the product of illegal interrogation, made, as it was according to the state's evidence, after Jones had indicated his desire to remain silent.

3. That the statement was not knowingly and voluntarily made because appellant was suffering from narcotics withdrawal symptoms at the time.

It might be questioned whether or not the motion to suppress encompassed these claims, but the trial court did

pass upon them and the state makes no contention otherwise except with respect to the third question. Since the questions will all eventually have to be resolved, they will all be considered as if properly presented.

[1] Dealing with the third question first, Detective VanBuskirk testified that he observed withdrawal symptoms while interrogating appellant. "* * * [H]is whole body would just jerk." On one or two occasions he asked to go to the bathroom because he was sick at his stomach and VanBuskirk took him to the bathroom. VanBuskirk asked him about his last "fix" and was told that it was either earlier that day or the day before. According to VanBuskirk, appellant kept "playing down" his withdrawal, saying that "everything was okay." VanBuskirk described appellant as "very sharp mentally" during the questioning, fully aware of what was going on.

According to Jones, he was in a state of withdrawal, had "cold shivers," nausea and thirstiness. In response to his counsel's inquiry: "Being in that condition, tell the Court whether or not you were fully cognizant of everything that was going on around you?" Jones said: "No, I don't think I was." He stated that it had been at least 36 hours since he "had had anything."

On the record this court cannot say that the trial court's resolution of the issue was erroneous. The trial court considered the presence of withdrawal symptoms, but concluded that, based on evidence as to appellant's mental condition, his physical condition did not preclude his making a statement which was the "result of a rational intellect and a free will * * *." *State* v. *Thomas,* 522 S.W. 2d 74, 76[1-3] (Mo.App.1975). The case of *United States* v. *Monroe,* 397 F.Supp. 726 (D.C.1975), relied upon by appellant, does not require that, as a matter of law, a statement made under circumstances here involved must be held involuntary.

[2] As for the illegal interrogation, the complaint is that the statement was exacted from appellant after he had exercised his right to remain silent. The argument ignores the fact that the statement was not the product of interrogation but was volunteered after VanBuskirk had informed appellant that his right to remain silent would be respected and that the interrogation was at an end. Such circumstances distinguish this case from that of *State* v. *Stevenson,* 523 S.W.2d 349 (Mo.App.1975), relied upon by appellant. In *Stevenson,* the defendant did invoke his right to remain silent but the officer did not indicate that the interrogation would cease. The court in that case noted that "* * * the officers not only failed to respect defendant's exercise of his rights, but gave him no ground to believe they were going to break off the interrogation. The only inference to be drawn from VanBuskirk's testimony is that the officers would have stayed in the room with the defendant for an indeterminate length of time, even after his expressed desire to remain silent and consult an attorney." 523 S.W.2d 351.

In this case, after the conversation with the attorney, VanBuskirk told appeallant that the interview was ended and that he would be returned to detention. The circumstances of this case do not involve a "compelling influence" (*Miranda* v. *Arizona,* 384 U.S. 436, 478, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)) which destroyed the voluntary character of appellant's remark. See *United States* v. *Cook,* 530 F.2d 145, 152-153[10] (7th Cir. 1975).

[3] Appellant's first complaint about the admissibility of his statement is bottomed upon the decisions in *Wong Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and *Brown* v. *Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). Those cases require that, when a statement of a defendant follows his illegal

arrest, its use in evidence against him depends not only upon satisfaction of safeguards designed to protect the Fifth Amendment privilege against self-incrimination, but also it is required that the statement be "sufficiently an act of free will to purge the primary taint of the unlawful invasion" (*Wong Sun* v. *United States,* 371 U.S. 471 at 486, 83 S.Ct. 407 at 416) of the privilege against illegal arrest as guaranteed by the Fourth Amendment, applicable to the states through the Fourteenth Amendment (*Mapp* v. *Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)).

In this case the trial court enumerated the factors which it concluded had attentuated the taint of the illegal arrest. Those factors were sufficient to support its conclusion that the appellant's volunteered statement was "an act of free will" which rendered it admissible in evidence. *State* v. *Johnson,* 530 S.W.2d 690, 692-694[1] (Mo. banc 1975). See *Commonwealth* v. *Fielding,* 353 N.E.2d 719 (Mass.1976); *Muetze* v. *State,* 73 Wisc.2d 117, 243 N.W.2d 393, 399-401[13] (1976).

It is therefore concluded that appellant's claim of error based upon the trial court's failure to suppress the use in evidence of his oral statement to Detective VanBuskirk is without merit.

[4] Appellant next contends that the trial court erred in admitting into evidence over his objections testimony of numerous crimes other than the one with which he was charged and for which he was tried.

The charge against appellant was based on the taking by force and violence of $400. Appellant complains that the state was permitted to introduce testimony pertaining to the theft of narcotics, the possession and use of narcotics, the theft of an automobile and numerous other offenses committed by Miller.

The state's witnesses White, Trabon and Miller all testified concerning the taking of narcotics from the Revco store, in addition to the money. Appellant's objections to such testimony was properly overruled because it related to a continuous transaction which was part of the offense charged. *State* v. *Fox*, 510 S.W.2d 832, 835[5] (Mo.App.1974); *State* v. *Cox*, 508 S.W.2d 716, 723[8] (Mo. App.1974); *State* v. *Morris*, 523 S.W.2d 329, 331[4, 5] [6] (Mo.App.1975).

[5, 6] In the examination of Miller, the prosecutor asked him whether Jones was a user of heroin. Miller responded, without objection, that he was. Miller was then asked whether he used heroin. He replied that he did. Then defense counsel objected and asked the court to direct the jury to disregard the statement and for a mistrial. The requests were overruled. There are several answers to appellant's claim of error in the ruling. In the first place, no objection was made to either the questions or answers regarding appellant's use of heroin. The questions propounded to Miller with regard to each of them made apparent the nature of the evidence sought, but the questions were not objected to. The motion to strike the answers thereafter came too late to provide a basis for error. *State* v. *Drake*, 298 S.W.2d 374, 376[4, 5] (Mo.1957); *State* v. *Peebles*, 337 Mo. 973, 87 S.W.2d 167, 168-169[4, 5] (1935). Finally, the trial court's conclusion that in any event the evidence was admissible under the motive exception to the evidence of other crimes rule (*State* v. *Rand*, 496 S.W.2d 30, 32[1, 2] (Mo.App.1973)) has not been shown to have been erroneous.

[7] Miller testified over objection to the theft of an automobile en route to the Revco store in which the two drove to the store and which they used in their departure from the store. This evidence was admissible as part of

the common scheme or plan for the robbery. *State* v. *Boyer*, 476 S.W.2d 613 (Mo.1972); *State* v. *Johnson*, 483 S.W.2d 65, 68[6] (Mo.1972).

[8] In the course of examining Miller, the prosecution, without objection, elicited that Miller had pleaded guilty to robbery in Kansas, to two robbery charges in Missouri and that the state had promised to drop other robbery charges, a car theft charge and two charges of assault. At the conclusion of the testimony, defense counsel moved to strike the testimony on the grounds that, since Miller had testified that he had seen appellant daily for two months before the Revco robbery, the jury would assume that appellant was also involved in the other offenses for which Miller was charged and therefore Miller's testimony brought in evidence of other offenses by appellant. However, except possibly for the car theft, referred to above, there was no testimony linking appellant with any of the other offenses with which Miller had been charged. There was no testimony that the offenses occurred during the two or three-month period in which Miller and appellant saw each other daily. There being no evidentiary basis for the assumption upon which the objection was based, the overruling of the belated motion to strike was not error.

[9] Appellant next contends that the trial court erred in permitting VanBuskirk to testify concerning the statement taken from Miller and in permitting the state to offer in evidence the portion of Miller's statement which related to the Revco robbery and implicated appellant. The appellant here argues that the trial court's overruling his objection to such evidence was erroneous because the statements "were self-serving, hearsay and a prejudicial attempt to use an extrajudicial statement to improperly bolster said witness' testimony." (From the

argument in appellant's brief the witness whose testimony was sought to be bolstered, according to appellant, was Miller. No such objection was voiced at the trial and it cannot be raised here now.)

Appellant relies on the rule, laid down in *State* v. *Kinne,* 372 S.W.2d 62 (Mo.1963), and *State* v. *Rippee,* 512 S.W.2d 235 (Mo.App.1974), which prohibits the use of an extrajudicial statement by a party not a witness as substantive evidence of the facts to which the statement relates. That is not the rule applicable here. VanBuskirk testified that appellant read the statement of Miller and later said: "What Jerry (Miller) told you is true." This was an "adoptive admission" which permitted the state to introduce the relevant portions of the statement originally made by another. *State* v. *Cooley,* 221 S.W.2d 480, 487[20] (Mo.1949); *State* v. *Roulette,* 451 S.W.2d 336 (Mo.1970). The trial court's ruling was not erroneous.

[10] Appellant next complains of the failure of the trial court to grant a mistrial because, in closing argument, the prosecutor said: "No witness or evidence was presented to refute the state's case." Appellant contends that was a comment on his failure to testify, in violation of federal and state constitutional provisions and § 546.270, RSMo 1969.

In support of his assignment of error, appellant relies upon the dissenting opinion of Judge Seiler in the case of *State* v. *Hutchinson,* 458 S.W.2d 553, 559 (Mo. banc 1970). This court, however, is obliged to follow the view of the majority of the Supreme Court in that case. Under the majority decision in that case, the failure of the trial court to grant a mistrial on the grounds here urged was not error. As in *Hutchinson,* there was not in this case a "direct and certain reference to failure of appellant to testify." 458 S.W.2d at 556[4]. See *State* v. *Overall,* 519 S.W.2d 549 (Mo.App.1975).

[11] Appellant next complains that the trial court erred in preventing his attorney in his argument from arguing the consequences of an illegal arrest as it might affect the voluntariness of the appellant's statement to VanBuskirk. In his argument, defense counsel stated: "* * * I can suggest to you that the evidence shows that the arrest of all three of these parties was a total illegal arrest." The prosecutor objected to the argument on the grounds that there was no evidence before the jury to support that argument. Defense counsel responded that Miller had testified that he was not shown a warrant prior to his arrest. The trial court ruled that argument could be made on that basis but that defense counsel could not argue further that the arrest was illegal. In this court, appellant contends that the trial court's ruling prevented him from relying upon the illegality of the arrest as a matter for consideration with respect to the voluntariness of his statement.

The objection is without merit for several reasons. In the first place, there was no evidence before the jury as to the basis for appellant's arrest. Appellant has made no effort to point out any evidence which would have supported the attempted argument. He was permitted to argue the effect of a warrantless arrest and did so. The trial court's ruling on this issue was not erroneous.

[12] Appellant next complains of the trial court's remark in the course of voir dire examination of the jury panel.

In the voir dire, defense counsel inquired whether members of the panel had been victims of crime. Seven had responded that they had but said that their experience would not prevent their giving appellant a fair trial. The eighth juror who responded affirmatively had had several criminal offenses involving him or his business and he was excused when he said that he felt that his experi-

ences might cause him to be prejudiced against a person charged with a crime.

At that time the court explained to the jury that "there is a good deal of difference between being against crime, and being able to give a fair and impartial trial to someone who is charged with a crime. * * * But a general feeling of being opposed to crime is not inconsistent with being able to give someone who is charged with a crime a fair and impartial trial."

Defense counsel objected that the court's remarks were "outside the Court's permissive (sic) oral instructions" and he moved for discharge of the panel. The motion was overruled. Defense counsel continued this line of questioning. Ten more panel members responded that they or persons close to them had been victims of crime. Nine said that the experience would not prejudice them. A tenth said his would and he was excused.

Appellant here contends that the trial court erred in entering into voir dire with his remarks which were prejudicial to the defendant. He really offers only his conclusion to that effect, unsupported by any authority. He does suggest that MAI-CR 1.02 is the only oral instruction which the court may give the jury panel. No such limitation appears in the comments on use under this instruction. The remarks here have not been shown to have constituted an abuse of the discretionary authority of the trial judge in guiding voir dire examination. *State* v. *Scott*, 515 S.W. 2d 524 (Mo.1974).

[13] Appellant has offered neither argument nor authority in support of his contention that the trial court erred in failing to strike for cause panel members who stated that they had been victims of criminal acts. His assertion that he had to use eight preemptory challenges to strike panel members "who had stated that they were victims of a crime but after having heard the Court's remarks stated that they were not prejudiced by the fact that they were the victim of a crime" is not supported by the record. Six of the persons named had been questioned and made such response prior to the trial court's remarks.

[14, 15] Appellant contends that his motion for a directed verdict of acquittal should have been sustained. He argues that the state failed to prove his connection with the robbery because Miller's testimony was not corroborated, the description of the Revco employees of the man alleged to have been appellant was totally different from appellant's physical characteristics and those persons could not identify appellant as one of the robbers.

Appellant's argument on this score is based primarily upon the claim that Miller's statement and testimony were not worthy of belief. He points out that Miller made a deal with the state to testify in return for a promise of leniency and that Miller knew that Jones and Miller's wife were "carrying on sexual relations." Appellant argues that he should not, in those circumstances, be convicted on the testimony of Miller alone. Appellant ignores completely the state's evidence that he agreed that what Miller said in his statement was correct. That evidence is also entitled to consideration and considering that with the other evidence it is obvious that the state made a submissible case against the appellant. Miller's credibility was for the jury and is not determinable as a question of law. *State* v. *Morris*, 518 S.W.2d 79, 81-82[3-5] (Mo.App. 1974).

Appellant argues that, although the evidence showed that he was 6′ tall and weighed about 200 pounds at the time of the robbery, the victim described the robber, who, according to Miller, was appellant, as 5′8″ to 5′9″ tall, weighing around 155 pounds. The witness's testimony was based upon estimates made under circumstances not conducive to accuracy. The testimony did not give rise to such an

inconsistency in the state's evidence as to destroy the submissibility of the case. *State* v. *Williams,* 515 S.W.2d 544, 549[5] (Mo.1974).

[16] The jury retired to conisder its verdict at 4:30 P.M. At 7:30, they returned to the courtroom and advised the court that they stood 8 to 4. The court stated that he would give an additional instruction. Defense counsel objected and asked for a mistrial. The objection was overruled and the court gave the "hammer" instruction, MAI-CR 1.10. At 9:30, the jury returned to the courtroom and the foreman announced that they stood 10 to 2 and stated that he had hope of further progress. The jury resumed its deliberation and at 11:05 P.M. a verdict of guilty was returned.

Appellant here contends that the trial court erred in overruling his request for a mistrial and contends that the circumstances show that the final verdict was a compromise; the result of undue coercion by the court's giving of the "hammer" instruction. The giving of such instruction and refusal to declare a mistrial were matters for the trial court's discretion. The circumstances here do not demonstrate an abuse of that discretion. *State* v. *Barron,* 465 S.W.2d 523, 530[14, 15] (Mo.1971); *State* v. *Doepke,* 536 S.W.2d 950, 951[6] (Mo.App.1976). Appellant's speculation that the jury resorted to compromise as a result of the giving of the instruction is nothing more than speculation.

[17] Appellant finally faults the verdict returned by the jury because it failed to designate the place of imprisonment. The form of verdict followed that found in MAI-CR 2.86(a). See *State* v. *Franklin,* 379 S.W.2d 526, 527-528[4, 5] (Mo.1964).

Judgment affirmed.

All concur.

APPENDIX "B"

NO. 60425

IN THE SUPREME COURT OF MISSOURI
KANSAS CITY DISTRICT NO. 28583

September Session 1977

State of Missouri,
Respondent,

vs. TRANSFER

Bradford R. Jones,
Appellant.

Now at this day, on consideration of Appellant's Application to transfer the above entitled cause from the Kansas City District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1977, and on the 14th day of November 1977, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 14th day of November, 1977.

/s/ Thomas F. Simon Clerk.
/s/ by Janice B. Hanson D. C.

APPENDIX "C"

STATE of Missouri, Respondent,

v.

Bradford R. JONES, Appellant.

No. 28667.

Missouri Court of Appeals,
Kansas City District.
Aug. 29, 1977.

Motion for Rehearing and/or Transfer
Denied Oct. 12, 1977.

Application to Transfer Denied
Nov. 14, 1977.

Defendant was convicted before the Circuit Court, Jackson County, James A. Moore, J., of robbery in the first degree with a deadly weapon, and he appealed. The Court of Appeals, Robert R. Welborn, Special Judge, held that: (1) trial court did not err in overruling motion to disqualify judge on ground that he had presided at previous trial of defendant; (2) remarks addressed by trial judge to defense counsel did not reflect upon defendant or defense counsel, and could not have affected defendant's right to fair trial; (3) trial court did not err in refusing two instructions offered on behalf of defendant and (4) trial court did not commit abuse of discretion in giving "hammer instruction" to jury which stood 11 to one after two hours and 40 minutes of deliberation.

Affirmed.

See also Mo.App., 558 S.W.2d 233; 558 S.W.2d 246.

1. Judges (Key) 51(3)

Trial court did not err, in prosecution for robbery in the first degree with a deadly weapon, in denying motion to disqualify judge on grounds that judge had presided at previous trial of defendant and would have judicial knowledge of matters that would cause him to be prejudiced against defendant, in that motion was neither in writing nor supported by affidavit as required by rule. V.A.M.R. Crim. Rule 30.12.

2. Criminal Law (Key) 1064(1)

Where defendant convicted of robbery in the first degree with a deadly weapon raised no ground of error in motion for new trial relating to application of Second Offender Act, other than allegations that evidence of previous offense was erroneously admitted for various reasons, defendant failed to preserve for appeal objection that trial court failed to make specific findings calling for application of Second Offender Act. Section 556.280 RSMo 1969, V.A.M.S.

3. Criminal Law (Key) 655(5)

Test of error with respect to allegation that remarks of trial judge demonstrated hostile attitude toward defense counsel, embarrassing defense counsel, and limiting his effectiveness in cross-examination, is whether or not trial court's remarks may have prejudiced minds of jury, depriving defendant of his right to fair trial.

4. Criminal Law (Key) 655(5)

In prosecution for first-degree robbery with a deadly weapon, remarks of trial judge to defense counsel during cross-examination of witness for State, although better not to have been volunteered, reflected neither upon defendant

nor defense counsel and could not conceivably have affected defendant's right to fair trial.

5. Criminal Law (Key) 785(9)

In prosecution for first-degree armed robbery with a deadly weapon, trial court did not err in refusing to give two instructions offered on behalf of defendant, cautioning jury concerning testimony of defendant's alleged accomplice in light of his having been granted immunity from further prosecution. MAI Criminal No. 2.01.

6. Criminal Law (Key) 863

In prosecution for first-degree armed robbery with a deadly weapon, trial court did not err in giving "hammer" instruction when, after two hours and 40 minutes of deliberation, jury stood 11 to one. MAI Criminal No. 1.10.

7. Robbery (Key) 26

Evidence in prosecution for first-degree armed robbery of market with a deadly weapon was sufficient for jury despite certain inconsistencies between testimony of victims and testimony given for State by alleged accomplice.

Roy W. Brown, John A. Wilson, Kansas City, for appellant.

John C. Ashcroft, Atty. Gen., J. Michael Davis, Asst. Atty. Gen., Jefferson City, for respondent.

Before SHANGLER, P. J., and WELBORN and HIGGINS, Special Judges.

ROBERT R. WELBORN, Special Judge.

Bradford R. Jones was found guilty on a jury trial of robbery in the first degree with a deadly weapon. Acting under the second offender law, the trial court fixed his punishment at 20 years' imprisonment. Jones has appealed from the judgment and sentence so imposed.

At around 10:30 P.M., February 13, 1975, two men carrying guns and wearing bandana masks over their faces entered the Hen House Market at 95th and Blue Ridge in Kansas City. They pointed the guns at Dennis Kurtz, a Hen House employee, and ordered him to open the cash registers. He did so and the robbers removed the cash from the registers. According to Kurtz, about $100 was taken. The robbers directed Kurtz and another Hen House employee to lie on the floor and the robbers then fled. Police were called and the scene of the offense was processed for fingerprints with negative results.

On March 28, Bradford R. Jones, Gerald Miller and Miller's wife were arrested at the Miller residence. Police interrogation of Miller and Jones followed as detailed in the case of *State* v. *Jones,* No. 28,583, Mo.App., 558 S.W.2d 233, decided contemporaneously with this case. Miller's statement admitted that he and Jones carried out the Hen House robbery.

Jones was indicted for the offense. On the day of trial, the state substituted an information for the indictment. The information added the charge of a prior conviction in Kansas in order to invoke the second offender act. At a pretrial hearing the court found the second offender law applicable.

At Jones's trial, the Hen House employees testified, but neither could identify either Jones or Miller as the robbers. Miller testified to the carrying out of the robbery. Detective VanBuskirk testified that Jones had stated that Miller's statement which VanBuskirk reduced to writing was true.

No evidence was offered by the defendant.

The jury returned a verdict of guilty and the trial court fixed punishment at 20 years' imprisonment and entered judgment and sentence accordingly.

In this court, appellant has repeated verbatim the objection and argument made in *State* v. *Jones*, No. 28,583, to the trial court's overruling of his motion to suppress the use in evidence of his statement to VanBuskirk. A single hearing was held on the motion to suppress. The evidence so presented has been detailed in No. 28,583. What was there said is dispositive of the complaint here voiced.

Appellant's second assignment of error also employs the identical argument found on the second point in No. 28,583—the complaint of the state's use of evidence of other offenses. Here appellant complains of evidence of his possession and use of narcotics, the theft of an auto for use in the Hen House robbery, and the numerous offenses with which Miller was charged, which appellant contends were inferentially charged to him also. In addition to the reasons for rejecting the assignment of error in No. 28,583, the assignment here is without merit for the further reason that there was no objection to Miller's testimony about the car theft nor to his testimony that "we were coming off of heroin" at the time of his arrest. Furthermore, appellant's cross-examination of VanBuskirk went into at length appellant's withdrawal symptoms at the time of his interrogation. For this reason as well as those stated in No. 28,583, this assignment of error is without merit.

Appellant's third assignment of error relates to VanBuskirk's reading of the excerpts from Miller's statement dealing with the Hen House robbery. Again the same argument is advanced as was rejected in No. 28,583 and what was said there is dispositive of the objection here.

The fourth assignment of error is based on statements of the prosecutor in his argument to the jury. Again, as in No. 28,583, the complaint raised is that the prosecutor commented upon the failure of the defendant to testify. The remarks objected to at trial on that ground were: "Now there is no evidence to the contrary that Brad Jones was not with [Miller]. Now the only evidence in the case * * *." At this point, defense counsel objected and the objection was overruled. The prosecutor continued:

"As I said, there is not one shred of evidence in his case that Bradford Jones was anywhere but the Hen House when it was robbed. There is not one shred of evidence in this case that indicates anything other than the robbery takes place on February 13th. There has been no witnesses testified about that, that it took place on any other date or there has been no other robbery at that place."

Again, as with the points previously considered, the argument here advanced is identical with that made by appellant in No. 28,583. What was said there answers the complaint now considered. There was no direct reference to appellant's failure to testify and the trial court's ruling was not error.

[1] Appellant's next assignment of error is based on the overruling of his oral motion to disqualify the judge. As above noted, on the day that the case came on for trial the state was permitted over his objection to substitute an information for the indictment against appellant. The only change was to allege a Kansas conviction which would make the second offender act applicable.

Defense counsel then moved orally to disqualify the judge on the grounds that because the judge had presided at the trial of No. 28,583, "the Court would have judicial knowledge of matters that would cause him to be prej-

udiced against this defendant * * *." The motion was overruled. Inasmuch as the motion was neither in writing nor supported by affidavit as required by Rule 30.12, the trial court's action was not error. *State* v. *Thost,* 328 S.W. 2d 36, 39[5] (Mo.1959); *State* v. *Johnson,* 522 S.W.2d 106, 110-111[7-8] (Mo.App.1975).

[2] Appellant next contends that the trial court failed to make specific findings calling for the application of the second offender act. § 556.280, RSMo 1969. The only ground of error relating to the second offender act found in appellant's motion for new trial was that the evidence of the previous offense was erroneously admitted for various reasons. The objection here raised has not been preserved for appellate review.

Appellant next contends that the trial court made prejudicial remarks to defense counsel during the cross-examination of Miller. Counsel cross-examined Miller concerning the arrangement with Missouri officials whereby numerous charges were dropped in return for Miller's agreement to testify against appellant. Miller was also asked about pleading guilty to a Kansas charge. Defense counsel expressed interest in the arrangements whereby Miller went back and forth between Missouri and Kansas in connection with the charges. Miller testified that he pleaded guilty to two charges in Missouri but was not sentenced on the pleas. He remained free on bond on the Missouri charges. He then went to Kansas, entered a plea and was sentenced on the Kansas charge. He then reappeared in Missouri to testify against appellant. In the course of the examination, the following incident, which is the basis of the claim of error, occurred:

"Q [by defense counsel] Were you given some permission by someone to then go to Kansas and try to dispose of your matters over there?

"A By my lawyers.

"Q Do you mean you went to Kansas without Court approval?

"A I don't know whether—you know, I take it it was worked out, because that was part of the agreement, as I understood it.

"Q Well, do you understand or not, I don't want to put words in your mouth, that ordinarily when you are on a bond in a certain jurisdiction, like the State of Missouri—

"THE COURT: Mr. Brown, I don't think we are going to have to inform this jury about what the law is. You may be 100 percent right, but this isn't the way we do things.

"MR. BROWN: Your Honor, what I am attempting to do—

"THE COURT: You can ask him what the facts are, but I am just not going to let counsel testify as to what the law in Missouri is, whether it is for the State or for the defendant.

"MR. BROWN: May I approach the bench, Your Honor?

"THE COURT: Yes, you may."

At the bench counsel objected that the court's remarks demonstrated a hostile attitude on the part of the court against defense counsel and a mistrial was requested. The request was overruled.

In this court appellant asserts that the remarks of the trial court embarrassed defense counsel, "intimidated him and unduly limited his effective cross-examination of such an important witness."

Appellant characterizes the remarks as "angry" but the transcript on appeal cannot, of course, reflect the tone of the court's remarks. The question is whether the remarks of the court as they now appear prejudiced appellant's right to a fair trial.

Appellant would equate the remarks here to those of the same trial judge which were found to have been prejudicial to the defendant in *State* v. *Wren*, 486 S.W.2d 447 (Mo.1972). In that case, the remark of the court was held to have had the possibility of causing the jury to feel that the court disbelieved the defense offered. The remark here was hardly of that nature. Of significance in that case is the court's observation that it involved "* * * an area * * * wherein precedent is of little value and each case must be resolved on its own facts." 486 S.W.2d at 448.

State v. *Wendel*, 532 S.W.2d 838 (Mo.App.1975) also relied upon by appellant involved a remark by the trial court which "served to notify the jury that the trial court considered defendant a man of violence— * * *." 532 S.W.2d at 839. The remark was held prejudicially erroneous. However, the remark here involved was certainly not of that nature.

The transcript shows that, despite the claim now made of embarrassment, intimidation and limitation of cross-examination, defense counsel continued to examine the witness at length concerning his comings and goings between Kansas and Missouri, demonstrating generally that the witness had no knowledge of what, if any, arrangements existed on that score.

[3, 4] The test of error in a matter such as this is whether or not the trial court's remarks may have prejudiced the minds of the jury, depriving the defendant of

his right to a fair trial. *State* v. *Hill*, 518 S.W.2d 682, 685[6-9] (Mo.App.1975); *State* v. *Ross*, 371 S.W.2d 224, 228[7, 8] (Mo.1963). The remarks here, although better not to have been volunteered, reflect neither upon defendant nor defense counsel. They could not conceivably have affected defendant's right to a fair trial. *State* v. *Thompson*, 465 S.W.2d 590, 593[7] (Mo.1971).

[5] Appellant next complains of the trial court's refusal of two instructions offered on behalf of defendant, cautioning the jury concerning Miller's testimony in the light of his having been granted immunity from further prosecution. The trial court's refusal to give these instructions was directed by Notes on Use to MAI-CR 2.01, limiting instructions to be given on the credibility of witnesses and the weight to be accorded their testimony. *State* v. *Lang*, 515 S.W.2d 507, 510-511 (Mo.1974).

Appellant suggests that "the MAI committee and the Appeals Court should re-examine their thinking in line with [Federal criminal instruction 9.04]." This court has no authority to introduce such an instruction, directly contrary to MAI notes on use.

[6] Appellant also complains because, after two hours—40 minutes deliberation the jury stood 11 to 1, the court gave MAI-CR 1.10, the so-called "hammer instruction." As pointed out in No. 28,583, the giving of such an instruction lies in the trial court's discretion and no abuse of that discretion has been demonstrated here.

[7] Finally, appellant contends that his motion for directed verdict should have been sustained because of inconsistences in the testimony of the state's witnesses. The inconsistencies were between the Hen House employees' description of the robbers' attire and Miller's testimony. The employees said one robber had a red bandana over his

face and the other a blue bandana and that neither wore headgear. Miller said they both had blue bandanas and that both he and appellant wore beanies pulled down to their eyes. An employee said $100 was taken. Miller said it was $300. These inconsistencies did not destroy the submissibility of the state's case.

Miller's statement was corroborated by the testimony of VanBuskirk that appellant said that what Miller said was true. Miller's credibility is not to be determined as a matter of law. The factors affecting his credibility, including the deal with the state in return for his testimony and the relations between appellant and Miller's wife, were fully explored and were before the jury, to be passed upon by that body and not by this court.

Judgment affirmed.

All concur.

APPENDIX "D"

NO. 60426

IN THE SUPREME COURT OF MISSOURI
KANSAS CITY DISTRICT NO. 28667

September Session, 1977

State of Missouri,
Respondent,

vs. TRANSFER

Bradford R. Jones,
Appellant.

Now at this day, on consideration of Appellant's Application to transfer the above entitled cause from the Kansas City District, Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1977, and on the 14th day of November 1977, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 14th day of November, 1977.

/s/ Thomas F. Simon Clerk.
/s/ by Janice B. Hanson D.C.

APPENDIX "E"

STATE of Missouri, Respondent,

v.

Bradford R. JONES, Appellant.

No. KCD 28868.

Missouri Court of Appeals,
Kansas City District.
Aug. 29, 1977.

Motion for Rehearing and/or Transfer
Denied Oct, 12, 1977.

Application to Transfer Denied
Nov. 14, 1977.

Defendant was convicted before the Circuit Court, Jackson County, Donald B. Clark, J., of assault with intent to kill with malice, and he appealed. The Court of Appeals, Robert R. Welborn, Special Judge, held that evidence was sufficient to carry case to jury.

Affirmed.

1. Homicide (Key) 282

Evidence in prosecution for assault with intent to kill with malice was sufficient to carry case to jury despite discrepancy between testimony of alleged accomplice of defendant and eyewitnesses as to which of two robbers fired shot which struck pizza restaurant employee, in that both defendant and his accomplice would be responsible regardless of which of them fired shot, and case was submitted to jury on that basis. Section 559.180 RSMo 1969, V.A.M.S.

2. Criminal Law (Key) 863(1)

Trial court did not commit abuse of discretion, when jury returned to courtroom after six hours of deliberation and foreman informed court that jury stood 11 to one, in giving "hammer" instruction. MAI Criminal No. 1.10.

Roy W. Brown, John A. Wilson, Kansas City, for appellant.

John C. Ashcroft, Atty. Gen., William F. Arnet, Asst. Atty. Gen., Jefferson City, for respondent.

Before SHANGLER, P. J., and WELBORN and HIGGINS, Special Judges.

ROBERT R. WELBORN, Special Judge.

Appeal from judgment of guilty and sentence to 20 years' imprisonment for assault with intent to kill with malice. § 559.180, RSMo 1969. Jury returned verdict of guilty and court fixed punishment under the second offender act.

This is the third in a series of cases involving the appellant. See *State* v. *Jones*, No. 28,583, Mo.App., 558 S.W.2d 233 and No. 28,667, Mo.App., 558 S.W.2d 242 decided contemporaneously. The charge here arises out of a robbery by two persons of a Pizza Hut restaurant on Wornall Road in Kansas City on January 22, 1975. Two persons carrying guns entered the Pizza Hut at around 11:30 P.M. The lower part of their faces was covered with bandanas. One went to the cash register and took its contents. The other went behind the counter and approached an employee, Corwin Gohn, who was talking on the telephone. This man, described by another witness as the shorter of the two robbers, told Gohn, "We want

the money." When Gohn turned his head, the robber shot him in the neck.

The robbers fled and police were called. A spent .22 caliber bullet was found some 8½' from the telephone used by Gohn.

On March 15, 1975, a police officer was told that an automobile had been struck by a second vehicle on a shopping center parking lot. The driver of the second vehicle was pointed out to the officer who approached the car and noticed that the driver appeared to be intoxicated. The driver was Gerald Wayne Miller. Miller was placed under arrest for driving while intoxicated. Search of Miller's person produced a .22 caliber pistol carried in his waistband. A blue and white bandana, a pair of wire cutters, a stocking cap and two pairs of leather gloves were found on Miller's person. A pillow case was discovered under Miller's jacket. Miller was charged with careless driving, driving while intoxicated, driving while under the influence of narcotics and carrying a concealed weapon. He was released on bond.

Ballistics tests revealed that the .22 caliber bullet found at the Pizza Hut had been fired from the weapon found on Miller's person. On March 28, 1975, police arrested Miller, Miller's wife and appellant at the Millers' residence in Kansas City. Interrogation produced a statement from Miller, admitting the Pizza Hut robbery and naming appellant as the robber who shot Gohn. Interrogation of appellant ended with the questioned statement "What Jerry (Miller) says is true."

Appellant was charged with assault with malice by reason of the shooting of Gohn. Gohn and another employee testified concerning the robbery and shooting but neither could identify the assailants. Miller testified and

said that appellant participated in the robbery and shot Gohn. Officer VanBuskirk testified to appellant's statement.

The only evidence offered by appellant was a Kansas City Police pick-up order issued in connection with the Pizza Hut robbery which described the persons sought as: "Race N" "Sex M."

The case was submitted to the jury at around noon on April 21, 1976. At 6:00 P.M., the jury returned to the courtroom and the foreman told the court that the jury stood 11 to 1. The court thereupon, over appellant's objection, gave the "hammer" instruction. At 6:30 P.M., the jury returned to the courtroom and announced that it had reached a verdict of guilty.

After his motion for new trial had been overruled, the trial court, having previously found the second offender act applicable, sentenced appellant to 20 years' imprisonment, the sentence to be consecutive to those imposed in No. 28,583 and No. 28,667. This appeal followed.

In this court, the assignments of error duplicate those advanced and considered in the other two cases involving this appellant. In many instances, the argument is the same, verbatim, as in the other cases. Thus, in this case there is the objection to the overruling of the motion to suppress, to the admission of evidence of other crimes, to VanBuskirk's reading of the excerpts from Miller's statement dealing with the Pizza Hut robbery, to argument on the grounds of reference to failure of appellant to testify, to failure to direct a verdict of not guilty because of inconsistencies in the testimony of the state's witnesses, and finally to the giving of the "hammer" instruction.

There is no need to repeat what has been said concerning the ruling on the motion to suppress. See *State*

v. *Jones*, No. 28,583, Mo.App., 558 S.W.2d 233. The evidence of other crimes deals with the stealing of an auto preparatory to the crime, evidence of drug possession and use and other crimes by Miller. The same argument is advanced as in the other cases, with no notice having been taken of the fact that the only reference to the auto theft was in the prosecutor's opening statement, the court ruling thereafter that evidence on that matter could not be produced and none was. The argument is lacking in merit here as in the other cases.

VanBuskirk's reading of the excerpts from Miller's statement relating to the Pizza Hut is subject to the same objection as in the other two cases and the same argument is advanced as was previously found wanting.

The argument objected to appeared in the prosecutor's statement: "The evidence uncontroverted that Bradford Jones was an addict." Objection was on the ground that there was no evidentiary basis for the statement. The objection was sustained and the jury instructed to disregard the statement but request for a mistrial was denied. Some time later, the prosecutor said: "Now it's evidence of that particular evening that we're talking about and the State's evidence of what happened that night is uncontroverted." No objection to that statement was made. Appellant now contends that the remarks of the prosecutor were comments on the failure of the appellant to testify. Again, it is to be noted that the first remark was not objected to on that ground and the second remark was not objected to at all. In any event, the same argument made in the prior cases is repeated. Again there was not direct reference to the failure of appellant to testify and what was said in the prior cases in disposing of similar objections is here applicable.

[1] The inconsistency in the testimony of the state's witnesses lies largely in the fact that the employees said that the shorter of the two robbers went behind the counter and shot Gohn, whereas Miller, who was shorter than appellant, testified that appellant was the man who fired the shot. The discrepancy is not destructive of the state's case since both Miller and appellant would be responsible, regardless of who fired the shot, and the case was submitted on that basis. Again the credibility of Miller is argued but that is not determinable as a matter of law.

[2] The problem with the "hammer" instruction is the same as that in the other two cases. No abuse of discretion has been demonstrated.

Judgment affirmed.

All concur.

APPENDIX "F"

NO. 60427

IN THE SUPREME COURT OF MISSOURI
KANSAS CITY DISTRICT #28868

September Session 1977

State of Missouri,
Respondent,

vs. TRANSFER

Bradford R. Jones,
Appellant.

Now at this day, on consideration of Appellant's Application to transfer the above entitled cause from the Kansas City District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1977, and on the 14th day of November 1977, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 14th day of November 1977.

/s/ Thomas F. Simon Clerk.
/s/ by Janice B. Hanson D.C.